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Prior Inconsistent Statements Suppressed as Violative of Miranda May Be Used for Impeachment Purposes Notwithstanding Defendant's Contention That They Were Fabricated by Police

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DEVELOPMENTS IN NEW YORK LAW

Prior inconsistent statements suppressed as violative of Miranda *may be used for impeachment purposes notwithstanding defendant's contention that they were fabricated by police*

The Supreme Court's initial pronouncement of the exclusionary rule concerning evidence obtained in violation of a defendant's fifth amendment rights suggested that such evidence would be inadmissible at trial for all purposes.[184] Subsequently, in *Harris v.*

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[184] Miranda v. Arizona, 384 U.S. 436 (1966). At common law, the manner in which evidence was obtained was not determinative of its admissibility. 8 J. WIGMORE, EVIDENCE § 2183 (McNaughton rev. ed. 1961); *see, e.g.*, Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897); State v. Mathers, 64 Vt. 101, 23 A. 590 (1892). In Weeks v. United States, 232 U.S. 383 (1914), however, the Supreme Court adopted the exclusionary rule, which renders evidence seized in violation of a defendant's fourth amendment rights inadmissible as evidence in chief. *Id.* at 398. Made applicable to the states through the fourteenth amendment, Mapp v. Ohio, 367 U.S. 643 (1961), the exclusionary rule was later expanded to include restrictions on the use of illegally obtained evidence for impeachment purposes. *See* Agnello v. United States, 269 U.S. 20, 35 (1925); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920). In *Agnello*, the police seized a quantity of narcotics during an unlawful search of the defendant's home. The defendant did not testify about the illegally seized items on direct examination and, on cross-examination, he denied ever having seen them. Subsequently, the prosecution sought to introduce the items into evidence. 269 U.S. at 30. The Supreme Court held that the illegally seized evidence could not be used for purposes of impeachment. *Id.* at 34-35. The *Agnello* Court followed the rule first enunciated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), wherein Mr. Justice Holmes stated that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 269 U.S. at 35 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). Walder v. United States, 347 U.S. 62 (1954) established a limited exception to the rule laid down in *Agnello*. In *Walder*, the Court ruled that illegally obtained evidence may be used in rebuttal once the defendant goes beyond denying the charges against him and makes statements of a general nature. *Id.* at 65. Specifically, *Agnello* was distinguished on the basis of the *Walder* defendant's "sweeping claim that he had never dealt in or possessed any narcotics." *Id.* at 66. It should also be noted that *Walder* concerned evidence collateral to the crime charged, whereas *Agnello* dealt with evidence which was directly related to the crime charged. *See generally* Note, *The Collateral Use Doctrine: From* Walder *to* Miranda, 62 NW. U.L. REV. 912 (1968).

Miranda v. Arizona, 384 U.S. 436 (1966), significantly broadened the scope of the exclusionary rule. The *Miranda* Court held that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. *See generally* Kent, Miranda v. Arizona—*The Use of Inadmissible Evidence for Impeachment Purposes*, 18 W. RES. L. REV. 1177 (1967); Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579 (1968).

Prior to Harris v. New York, 401 U.S. 222 (1971), some courts read this as holding that statements obtained in violation of *Miranda* could not be used to impeach the defendant. *See, e.g.*, State v. Galaso, 217 So. 2d 326 (Fla. 1968); *cf.* Agius v. United States, 413 F.2d 915, 920 (5th Cir. 1969) (vitality of *Walder* as applied to such statements is "extremely

New York,[185] the Supreme Court qualified its position by holding that statements made in the absence of *Miranda* warnings may be used to impeach the credibility of a witness provided "the trustworthiness of the evidence satisfies legal standards."[186] The extent to which the trustworthiness proviso of *Harris* limits the availability of illegally obtained evidence for impeachment purposes has been uncertain.[187] Recently, in *People v. Washington*,[188] the Court of Appeals held that the trustworthiness requirement did not bar the admission of prior inconsistent statements where, at a pretrial suppression hearing, the court had determined that the defendant had neither been given the required *Miranda* warnings nor had made the statements in issue.[189]

In *Washington*, the police went to the defendant's apartment to investigate a report of a man with a gun.[190] After being admitted by the defendant's wife, they found the defendant asleep on the

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questionable"); People v. Kulis, 18 N.Y.2d 318, 322-23, 221 N.E.2d 541, 542, 274 N.Y.S.2d 873, 875 (1966) (statement obtained in violation of *Escobedo* held inadmissible for impeachment), *discussed in* Note, *New York's Decision To Allow Impeachment in Order To Find Truth*, 13 N.Y.L.F. 148 (1967). *Contra*, State v. Butler, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969).

[185] 401 U.S. 222 (1971).

[186] *Id.* at 224. The petitioner in *Harris* was charged with selling heroin to an undercover police officer. Harris was interrogated without having been informed of his right to counsel. *Id.* at 222-23. At trial, he took the stand and denied committing the alleged crimes. Conceding that the defendant's statements were inadmissible under *Miranda*, the prosecution made no effort to use them in its case in chief. *Id.* at 223-24. On cross-examination, however, prior inconsistent statements made during the interrogation were admitted into evidence for the purpose of impeaching the defendant's credibility. *Id.* at 223. In a 5-4 decision, the Supreme Court affirmed the resulting conviction, holding that the statements could be used to impeach the defendant's credibility despite the lack of *Miranda* warnings provided they met "legal standards of trustworthiness." *Id.* at 224. The Court relied on Walder v. United States, 347 U.S. 62 (1954), where a similar exception was created to the fourth amendment exclusionary rule. *See* note 184 *supra*. This reliance on *Walder* has been criticized, however, on the ground that Walder was impeached as to collateral matters, *see* note 184 *supra*, while Harris' testimony directly related to the crime charged. *See, e.g.*, Harris v. New York, 401 U.S. 222, 227-28 (1971) (Brennan, J., dissenting); Stone, *The* Miranda *Doctrine In The Burger Court*, 1977 SUP. CT. REV. 99, 109-11; Dershowitz and Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1211-18 (1971); Recent Decisions, *Constitutonal Law—Evidence—Statements Inadmissible Against a Defendant as Substantive Evidence May be Used to Impeach Credibility of Defendants Trial Testimony*, Harris v. New York, 401 U.S. 222 (1971), 39 GEO. WASH. L. REV. 1241, 1245-47 (1971).

[187] *See* Stone, *The* Miranda *Doctrine In The Burger Court*, 1977 SUP. CT. REV. 99, 113.

[188] 51 N.Y.2d 214, 413 N.E.2d 1164, 433 N.Y.S.2d 745 (1980), *aff'g* 68 App. Div. 2d 90, 416 N.Y.S.2d 626 (2d Dep't 1979).

[189] 51 N.Y.2d at 217-18, 223, 413 N.E.2d at 1160-61, 1163, 433 N.Y.S.2d at 749.

[190] *Id.* at 218, 413 N.E.2d at 1160, 433 N.Y.S.2d at 746.

living room couch with a gun protruding from his pocket.[191] A police officer removed the gun and arrested him.[192] At a pretrial suppression hearing,[193] the arresting officer testified that the defendant, after being advised of his *Miranda* rights, had made two inconsistent statements as to how he had obtained the gun.[194] The defendant's counsel noted, however, that the alleged statements were not included in the report of the arresting officer or mentioned by him at the preliminary hearing.[195] This, he contended, led to the conclusion that the statements attributed to the defendant had been fabricated by the arresting officer.[196] The hearing judge suppressed the statements, ruling that the People had not established beyond a reasonable doubt that *Miranda* warnings

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[191] *Id.*

[192] *Id.*

[193] The defendant sought a pretrial suppression hearing on the issue of whether the oral statements were "made in violation of [his] Constitutional rights." 68 App. Div. 2d 90, 92, 416 N.Y.S.2d 626, 628 (2d Dep't 1979). The method previously used by the New York courts to determine the admissibility of confessions and other extrajudicial statements was declared unconstitutional in Jackson v. Denno, 378 U.S. 368 (1964). Under that procedure, when a question of voluntariness was presented the trial court ordinarily submitted the issue to the jury. Where there was no dispute as to the relevant facts, however, the judge decided the issue of voluntariness. *See* People v. Doran, 246 N.Y. 409, 159 N.E. 379 (1927); People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909). If the jury found the confession to be involuntary, it was instructed to disregard it entirely. Although this procedure was upheld in Stein v. People, 346 U.S. 156 (1953), the Supreme Court subsequently found it to be violative of defendants' fourteenth amendment rights. Jackson v. Denno, 378 U.S. 368, 391 (1964).

In People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965), the Court of Appeals adopted a new procedure which provided for the separate hearing to resolve questions of voluntariness. *Id.* at 77, 204 N.E.2d at 182-83, 255 N.Y.S.2d at 842-43; *see* CPL § 710.30 (McKinney Supp. 1980-1981). At the *Huntley* hearing, the prosecution bears the burden of establishing the voluntariness of statements beyond a reasonable doubt. The defendant may be impeached if he testifies but he may not be cross-examined on the merits of the case unless his statements on direct examination make the questions relevant. *See* W. RICHARDSON, EVIDENCE § 550 (10th ed. Prince 1973). If the voluntariness of the defendant's statements is not established beyond a reasonable doubt then the statements must be suppressed. *See* People v. Huntley, 15 N.Y.2d at 78, 204 N.E.2d at 183, 255 N.Y.S.2d at 842. Conversely, if the statements are shown to have been voluntary they will be admissible at trial. The defendant still may submit the issue of voluntariness to the jury at trial. Because the defendant, in effect, has two opportunities to have his confession discounted on the ground of involuntariness, this procedure has come to be known as the "humane rule." W. RICHARDSON, *supra*, at § 550.

[194] 51 N.Y.2d at 218, 413 N.E.2d at 1161, 433 N.Y.S.2d at 746. According to the arresting officer, the defendant initially stated that he had found the gun but later asserted that his wife had planted the gun on him. *Id.*

[195] *Id.*

[196] *Id.*

were given or that the statements were made.[197] The trial judge subsequently ruled that the suppressed statements could be used for impeachment purposes.[198] Testifying on his own behalf, the defendant denied any knowledge of how the gun had come into his possession and that he had made any statement to the police.[199] When called in rebuttal, the arresting officer testified that the defendant had indeed made conflicting statements as to how he had obtained the gun.[200] The defendant was found guilty of criminal possession of a weapon in the third degree.[201] His conviction was affirmed by the Appellate Division, Second Department.[202]

On appeal, a unanimous Court of Appeals affirmed.[203] Writing for the Court, Judge Wachtler initially rejected the prosecution's contention that trustworthiness was synonymous with voluntariness.[204] The Court observed that statements obtained through the use of involuntary means are inadmissible for all purposes not because of their inherent unreliability but rather because "the methods used to extract them offend the Constitution."[205] Judge Wachtler similarly refused to accept the defendant's contention that the hearing court's factual findings rendered the alleged statements inadmissible for impeachment purposes. The *Washington* Court reasoned that common-law rules of evidence do not require a court to determine whether prior inconsistent statements were actually made before permitting their use as an impeachment device.[206] A contrary holding, according to Judge Wachtler, would broaden the scope of suppression hearings and invade the jury's role as the arbiter of purely factual questions.[207] Moreover, the Court noted that

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[197] *Id.* at 219, 413 N.E.2d at 1161, 433 N.Y.S.2d at 746.

[198] *Id.*

[199] *Id.* at 219, 413 N.E.2d at 1161, 433 N.Y.S.2d at 747.

[200] *Id.*

[201] *Id.*

[202] 68 App. Div. 2d 90, 101, 416 N.Y.S.2d 626, 633 (2d Dep't 1979), *aff'd*, 51 N.Y.2d 214, 413 N.E.2d 1159, 433 N.Y.S.2d 745 (1980).

[203] *Id.* at 223, 413 N.E.2d at 1163, 433 N.Y.S.2d at 749.

[204] *Id.* at 220, 413 N.E.2d at 1162, 433 N.Y.S.2d at 747.

[205] *Id.*

[206] *Id.* at 221, 413 N.E.2d at 1162, 433 N.Y.S.2d at 748. Judge Wachtler conceded that a suppression judge may find it necessary, in some cases, to determine whether a defendant actually made a disputed statement. He noted, however, that this is a collateral finding which is necessary to measure the credibility of a police officer's testimony that he had advised the defendant of his rights. *Id.* at 221 n.1, 413 N.E.2d at 1162 n.1., 433 N.Y.S.2d at 748 n.1.

[207] *Id.* at 222, 413 N.E.2d at 1163, 433 N.Y.S.2d at 749. Judge Wachtler suggested that the net effect of a contrary holding would be a recognition of fabrication as an independent

although an involuntarily obtained confession may be improperly relied upon by the jury if admitted for impeachment purposes, the same risk is unlikely to be present where the jury finds that the statements themselves were fabricated by the police.[208] Finally, Judge Wachtler concluded that nothing in *Harris* mandated any change in the standards governing the use of prior inconsistent statements or in the scope of the exclusionary rule.[209]

It is submitted that the Court of Appeals' refusal to equate trustworthiness with voluntariness is consistent with recent decisions which indicate the existence of an independent constitutional ground for the exclusion of involuntary statements.[210] When statements are not found to be voluntary, the question of trustworthiness becomes irrelevant.[211] Moreover, since the limited purpose of

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basis for exclusion. *Id.* (*citing* Harris v. New York, 401 U.S. 222 (1971)).

[208] 51 N.Y.2d at 222, 413 N.E.2d at 1163, 433 N.Y.S.2d at 748-49.

[209] *Id.*

[210] *See, e.g.*, New Jersey v. Portash, 440 U.S. 450 (1979); Mincey v. Arizona, 437 U.S. 385 (1978); Jackson v. Denno, 378 U.S. 368 (1964); Rogers v. Richmond, 365 U.S. 534 (1961). In *Rogers*, the Court stated that involuntary confessions are inadmissible "not because such confessions are unlikely to be true but because the methods used to extract them offend the Constitution." *Id.* at 540-41.

The term voluntary has not remained static in meaning. Initially, this term was limited to physical coercion. *See, e.g.*, White v. Texas, 310 U.S. 530 (1940); Brown v. Mississippi, 297 U.S. 278 (1936). Later, however, psychological coercion came to be included in the concept. *See, e.g.*, Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949); Chambers v. Florida, 309 U.S. 227 (1940).

The justification for the voluntariness requirement has shifted from the inherent unreliability of the evidence, *see* Lisenba v. California, 314 U.S. 219, 236 (1941), to the fairness of police practices, *see* Rogers v. Richmond, 365 U.S. 534, 544 (1961), and the individual's ability to choose freely, *see* Lynumn v. Illinois, 372 U.S. 528, 534 (1963); Gallegos v. Colorado, 370 U.S. 49, 50-51 (1962). *See also* Haynes v. Washington, 373 U.S. 503, 513-14 (1963). Consequently, many variables enter into a contemporary determination of voluntariness. *See, e.g.*, Greenwald v. Wisconsin, 390 U.S. 519, 519-21 (1968) (physical disability); Beecher v. Alabama, 389 U.S. 35, 36 (1967) (race); Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (woman inexperienced with criminal law); Gallegos v. Colorado, 370 U.S. 49, 55 (1962) (age); State v. Smith, 342 S.W.2d 940, 941 (Mo. 1961) (educational level); People v. Schompert, 19 N.Y.2d 300, 305, 226 N.E.2d 305, 308, 279 N.Y.S.2d 515, 519, *cert. denied*, 389 U.S. 874 (1967) (intoxication).

Miranda v. Arizona, 384 U.S. 436 (1966), recognized the impracticality of the voluntariness test because the secretive nature of a custodial interrogation made it difficult to determine the circumstances under which a statement was made. The *Miranda* Court reasoned that the compulsion inherent in custodial interrogation can be dispelled only if the defendant is given proper warnings. *Id.* at 45-58. Thus, under *Miranda*, voluntariness equated with an intelligent waiver of one's rights.

[211] *See, e.g.*, New Jersey v. Portash, 440 U.S. 450, 459 (1979); Mincey v. Arizona, 437 U.S. 385, 398 (1978). In *Portash*, the Supreme Court held that a testifying defendant may not be impeached through the use of reliable grand jury testimony. *Id.* at 459-60. The Court reasoned that "[t]he Fifth and Fourteenth Amendments provide a privilege against *com-*

a pretrial suppression hearing is to determine the voluntariness of a confession, a claim by the accused denying the utterance of the challenged statement should not, in itself, invoke an application of the trustworthiness standard.[212]

Notwithstanding the proper resolution of these issues, it is suggested that the *Washington* Court failed to adequately define the scope of the trustworthiness proviso in cases where the suppressed statements are deemed to have been made voluntarily. Although the Court implied that trustworthiness is related to common-law limitations on the admissibility of prior inconsistent statements,[213] it did not attempt to delineate the exact nature of these standards nor did it apply them to the defendant's claim of fabricated evidence. Since the sole criterion in *Harris* restricting the use of uncoerced statements for impeachment purposes involves a determination of trustworthiness, clear guidance is critical. While trustworthiness has not been expressly rejected as a factor affecting the admissibility of voluntary statements or confessions, it is submitted that the *Washington* Court, in effect, has sanctioned a finding of voluntariness as the key determination.[214] In-

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pelled self-incrimination, not merely against unreliable self-incrimination." 440 U.S. at 459 (emphasis in original). Because testimony given under a grant of immunity is considered "coerced," it cannot be used to impeach the defendant's credibility at his subsequent trial. *Id.*

Other courts, however, have construed the *Harris* proviso as requiring only a showing of voluntariness. *See, e.g.*, People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); *cf.* Nowlin v. State, 346 So. 2d 1020, 1024 (Fla. 1977) (trustworthiness means, "at the very least," voluntariness). The California Supreme Court rejected the *Harris* doctrine as a matter of state constitutional law, on the ground that the rule would "resurrect the remains of the . . . voluntariness test" developed prior to *Miranda*. 16 Cal. 3d at 111, 545 P.2d at 278, 127 Cal. Rptr. at 366; *see* note 210 *supra*.

[212] *See* note 193 *supra*. By limiting the scope of the pretrial suppression hearings to issues of coercion, *see* Lee v. Mississippi, 332 U.S. 742, 744-45 (1948), the Supreme Court necessarily refused to include the issue of fabrication within the voluntariness concept. People v. Washington, 68 App. Div. 2d at 98, 416 N.Y.S.2d at 631 (2d Dep't 1979, *aff'd*, 51 N.Y.2d 214, 413 N.E.2d 1164, 433 N.Y.S.2d 745 (1980). Consequently, the fact that the defendant had denied making a statement is a prerequisite to submission to the jury. W. RICHARDSON, *supra* note 193, at § 502.

[213] Under the common-law concept of untrustworthiness, a confession would be deemed inadmissible if "the inducement [was] such that there was any fair risk of a false confession." 3 J. WIGMORE, EVIDENCE § 822, at 333. This rationale was subjected to severe criticism, *id.*, due to its rejection by the Supreme Court in Jackson v. Denno, 378 U.S. 368, 376-77 (1964) and Rogers v. Richmond, 365 U.S. 534, 540-41 (1961). 3 J. WIGMORE, *supra*, § 822 at 334. Thus, it is suggested that the *Washington* Court's reference to "common-law limitations" on the admissibility of prior inconsistent statements has further clouded the trustworthiness issue.

[214] In a case subsequent to *Harris*, the Supreme Court held that a previous conviction

deed, the lack of post-*Harris* authority precluding the use of illegally obtained evidence on the basis of trustworthiness indicates that its significance is rather limited. Though the trustworthiness proviso may be available as a bridge between the impeachment process and the constitutional mandate to protect the accused, its parameters remain undefined after *Washington.* Thus, the Court of Appeals perpetuates rather than clarifies the uncertainty engendered by *Harris* regarding legal standards of trustworthiness.

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Publisher may be held liable for republication of libel when grossly irresponsible acts were committed in course of original publication

The liability of a corporate media employer who publishes a libel[215] against a private person is founded upon imputation to the employer[216] of its employees' grossly irresponsible conduct.[217] It

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at trial in which the defendant's constitutional right to counsel had been violated could not be used to impeach his credibility as a witness when he testified on his own behalf in a separate and unrelated criminal trial. Loper v. Beto, 405 U.S. 473 (1972). Although the "trustworthiness" of such a conviction would appear to be in issue, the *Loper* Court did not address that issue in reaching its result. This omission in *Loper,* as well as the vagueness in *Harris* and *Washington,* suggest that perhaps the term "trustworthiness" has not yet been clearly defined because the courts are trying to protect the rights of defendants while attempting to insure that the most reliable evidence is introduced. *See generally* Nokes, AN INTRODUCTION TO EVIDENCE 294 (3d ed. 1962). Indeed, it appears that the degree of police misconduct, rather than the trustworthiness of the statements, is the crucial factor in the determination of admissibility. *Id.*

[215] Libel has been defined as a defamatory writing containing "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933). Complete defenses to an accusation of libel include truth, Dolcin Corp. v. Reader's Digest Ass'n, 7 App. Div. 2d 449, 454, 183 N.Y.S.2d 342, 347 (1st Dep't 1959), and privilege. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 114 at 776 (4th ed. 1971). Retraction and introduction of evidence tending to establish the plaintiff's preexisting bad reputation, although not complete defenses, can serve to mitigate damages. *Id.* at 799-801. For a brief discussion of the history of libel law see Curtis Publishing Co. v. Butts, 388 U.S. 130, 151-53 (1967).

[216] The individual author, the corporate publisher, and other persons involved in the publication of libel may be held jointly accountable. *See* Macy v. New York World-Telegram Corp., 2 N.Y.2d 416, 141 N.E.2d 566, 161 N.Y.S.2d 55 (1957); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920); Rinaldi v. Viking Penguin, Inc., 73 App. Div. 2d 43, 425 N.Y.S.2d 101 (1st Dep't 1980). The liability of a corporate publisher for the acts of